

NO. 42926-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Personal Restraint Petition Of:

TOMMY CROW, JR.,

Petitioner

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Wm. Thomas McPhee, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The evidence was insufficient to prove the "good Samaritan" aggravator factor.

2. The sentencing court improperly considered potential "good time" credits in determining petitioner's sentence.

3. To the extent the issues raised herein are waived because they were not raised on direct appeal, then petitioner was denied his right to effective assistance of appellate counsel¹

Issues Pertaining to Supplemental Assignments of Error

1. When there was no evidence David Miller, one of two murder victims, was killed while coming to the aid of an injured, stranded or otherwise imperiled person, was the evidence insufficient to find Miller was killed while acting as a good Samaritan?

2. Did the trial court err in considering potential "good time" credits in determining the length of petitioner's sentence?

3. Was petitioner denied effective assistance of appellate counsel on direct appeal because counsel failed to raise the sentencing issues raised herein?

¹ In his pro se personal restraint petition, Crow makes an ineffective assistance of appellate counsel claim based on the failure to raise a number of different issues in his direct appeal.

B. SUPPLEMENTAL STATEMENT OF THE CASE

1. Procedural Facts

The State charged Petitioner Tommy Crow, Bryan Eke and Christopher Durga with two counts of second degree murder and one count of second degree arson. CP 40-41. The State alleged that on March 27-28, 2008, Crow, Eke and Durga murdered David Miller and Norman Peterson and burned the tent Miller lived in. The State also alleged as sentencing aggravators that Miller was murdered while acting as a good Samaritan and Peterson's murder involved deliberate cruelty. Id.

Eke and Durga entered guilty pleas to the murders and agreed to testify against Crow in return for the State dropping the sentencing aggravators and the arson charge, and agreeing to recommend low-end standard range sentences. 10RP 1113-14, 11RP 1106-7, 1454-55.² Crow was found guilty by a jury and sentenced to 660 months in prison. CP 60, 62, 63, 65, 90-100, 122; 11RP 1398-1402, 1482.

Crow's judgment and sentence was affirmed in an unpublished opinion on direct appeal. CP 123-33. On December 23, 2011, Crow filed

² There are eighteen volumes of verbatim report of proceedings referenced as follows: 1RP - May 5, 2008; 2RP - May 7, 2008; 3RP - September 17, 2008; 4RP - November 15, 2008; 5RP - November 17, 2008; 6RP - December 17, 2008; 7RP - December 24, 2008; 8RP - March 4, 2009; 9RP - March 5, 2009; 10RP - six consecutively paginated volumes for the dates of March 9, 10, 11, 12, 17, 18 (a.m.), 2009; and 11RP - three consecutively paginated volumes (which inexplicably began at page "1048") for the dates of March 18 (p.m.), 19, 20, & 23, 2009.

a timely Personal Restraint Petition, which this Court found by ruling filed October 24, 2012,³ raised issues that "are not frivolous" and appointed counsel to assist Crow in this Court.

2. Relevant Substantive Facts

a. *The Incident*

This Court's decision in State v. Crow, No. 39075-2-II, sets forth the State's theory of the case at trial. CP 124-33. In summary, the State presented evidence that Crow, Eke and Durga, who shared a camp at a homeless encampment in west Olympia, murdered Miller, another camper, because he told police they had assaulted Scott Cover, another person living at the encampment. They allegedly murdered Peterson because he came upon them as they were killing Miller. After killing both Miller and Peterson, the trio allegedly tried to dispose of the bodies by burning them in Miller's tent. Id

b. *"Good Samaritan" Aggravator*

In closing argument, the prosecutor urged the jury to conclude the State had proved Miller was acting as a "Good Samaritan" at the time of his murder. The prosecutor argued Miller qualified as a good Samaritan at the time of his death because of his decision to report to police what he knew about the assault of Cover, arguing Miller did so to help protect

³ Although the signature page of this order states it was entered "this 24th day of October, 2010", the stamped filed date reads "2012 OCT 24".

others who lived in his community. 11RP 1352-53; see CP 85 (Instruction 27, defining "Good Samaritan" as "a person who comes to the aid of an injured, stranded, or otherwise imperiled person.").

Conversely, Crow's counsel argued the State failed to prove Miller was killed while acting as a good Samaritan, noting the lack of any evidence Miller was killed while attempting to come to the aid of Peterson or anyone else. Counsel acknowledged Miller's report to police, but argued that act did not make Miller of a good Samaritan at the time of his death. 11RP 1364-65.

The jury entered a verdict that Miller was a good Samaritan. CP 62 (Special Verdict Form 1-A). At sentencing, the trial court used the good Samaritan finding to impose an aggravated exceptional sentence of 360 months for the murder of Miller, 95 months above the top end of the standard range. 11RP 1482. In doing so, the court opined the jury found the aggravator based on Miller's decision to report to police what he knew about the assault of Cover, and concluded that was the reason Miller was killed. 11RP 1478-79. The court stated that "[I]t is hard to imagine a more compelling reason to impose an exceptional sentence than the facts I have outlined here." 11RP 1479. Although the court noted the "deliberate cruelty" aggravator associated with Peterson's murder, and imposed an additional 80 months above the standard range for that offense (300

months total), it specified it was purposefully imposing more punishment for the good Samaritan aggravator because it found it more egregious than the other. 11RP 1483-84. The court then stated:

In addition to the sentence -- the time for the sentence I've imposed, I will make the finding that the total sentence that has been imposed here would be justified by either of these aggravating circumstances in the absence of the other. For the reasons explained by [the prosecutor] which I find compelling, they have been divided between the two, not equally, but nearly so. However, if only one existed and not the other, I cannot see that a different sentence would be justified under these circumstances.

11RP 1484.

c. *Consideration of "Good Time" Credits*

The prosecutor recommended a total sentence of 600 months; two consecutive 300-month sentences for the murders, and a concurrent 43-month sentence for the arson. 11RP 1446-48. At the conclusion of the prosecutor's recommendation, the court inquired, "what credit for good time in the future will the defendant be eligible to receive that would subtract from the sentence you've recommended here?" 11RP 1451. The prosecutor informed the court Crow "would receive a maximum of ten percent only for good time." *Id.* Then, after directing imposition of 660-month sentence, the court noted, "With imposition of this sentence, Mr. Crow, you will serve, even with a good time credit, a full 50 years of

incarceration, and you will be in your mid 80s by the time that you become eligible to be released, if you survive to that time." 11RP 1483.

C. SUPPLEMENTAL ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE "GOOD SAMARITAN" SENTENCE AGGRAVATOR BEYOND A REASONABLE DOUBT.

When an unlawful sentence has been imposed, appellate courts have the power and the duty to correct it upon its discovery. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980). A court exceeds its authority when it orders a sentence beyond that authorized by law. Id. at 33. Any such order is invalid on its face. In re Pers. Restraint of Tobin, 165 Wn.2d 172, 176, 196 P.3d 670 (2008) (citing In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 866 67, 50 P.3d 618 (2002)). Here, Crow's 360-month sentence for the murder of Miller is unlawful because it is based upon an aggravating factor for which there was no supporting evidence.

To prove the good Samaritan sentence aggravator, the State had to prove beyond a reasonable doubt that Miller was killed while "was acting as a good Samaritan." RCW 9.94A.535(3)(w); CP 40; State v. Chanthabouly, 164 Wn. App. 104, 143, 262 P.3d 144, review denied, 173 Wn.2d 1018 (2011). As defined for Crow's jury; "A Good Samaritan is a person who comes to the aid of an injured, stranded, or otherwise

imperiled person." CP 85. Because there was no evidence Miller was killed while coming to the aid of anyone, the State failed to meet its burden. Therefore, it was error to enhance Crow's sentence based on a aggravating factor for which there was no supporting evidence.

This Court reviews a jury's finding that an aggravating factor exists under the sufficiency of the evidence standard. State v. Stubbs, 170 Wn.2d 117, 123, 240 P.3d 143 (2010); see also RCW 9.94A.585(4) (this Court may reverse a sentence outside of the standard range if "the reasons supplied by the sentencing court are not supported by the record."). Under this standard, the evidence is viewed in the light most favorable to the State. State v. Yates, 161 Wn.2d 714, 752, 168 P.3d 359 (2007). Even under this liberal standard, the State failed to meet its burden.

The term "good Samaritan" is not defined by statute, although there is at least one Washington statute that has been referred to as the "'Good Samaritan' statute." State v. Hillman, 66 Wn. App. 770, 776, 832 P.2d 1369, review denied, 120 Wn.2d 1011 (1992) (referring to RCW 4.24.300, which gives civil immunity to those who voluntarily "renders emergency care at the scene of an emergency or who participates in transporting, not for compensation, therefrom an injured person or persons for emergency medical treatment"). Similarly, there are no Washington cases discussing the precise meaning of the phrase "good Samaritan."

There are, however, numerous cases that use the phrase "good Samaritan" in reference to specific individuals in the context of their actions. See e.g., State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012) (prosecutor sought "Good Samaritan" aggravator for assault of person who was coming to the aid of another assault victim); Butzberger v. Foster, 151 Wn.2d 396, 412, 89 P.3d 689 (2004) ("The law has long recognized that seeing a person injured or in peril compels those called to follow the example of the Good Samaritan to provide assistance."); State v. McCreven, 170 Wn. App. 444, 284 P.3d 793 (2012) (prosecutor filed "Good Samaritan" aggravator with regard to person who was assaulted when he tried to come to the aid of the murder victim); State v. Hooper, 100 Wn. App. 179, 185 n.9, 997 P.2d 936 (2000) (in affirming aggravated exceptional sentence for assault of person who was calling 911 to report another assault in progress, Court refers to "'Good Samaritan' statute"); Hillman, 66 Wn. App. at 775-78 (exceptional sentence for defendant who murdered a person who stopped to render the defendant aid was a proper use of the "Good Samaritan" sentence aggravator).

What is consistent in all the cases referring to a "good Samaritan" is that the actions that made a person a good Samaritan were contemporaneous with the acts that rendered them a victim. In other

words, the temporal divide between the good Samaritan act and the resulting injury is very narrow, albeit not necessarily simultaneous.

Moreover, each case reveals that the "aid" provided by the good Samaritan is specifically directed towards helping a specifically imperiled person out of his or her predicament. For example, in Hooper, the good Samaritan's 911 call was to report an assault in progress, in Siers, the good Samaritan was assaulted while trying to defend another person who was in the midst of being assaulted, and in Hillman, the good Samaritan was murdered while he was helping his killer with a stuck truck.

As these cases reveal, the concept of being a "good Samaritan" in Washington is narrow. It includes only those circumstances where the qualifying act or acts are contemporaneous with the act that caused harm to the good Samaritan, rather than hours, days, or weeks before. The qualifying act is also limited to those that involve providing aid to a currently imperiled person, rather than to merely the public at large. This narrow definition comports with the historical application of the good Samaritan concept in Washington, and should apply in the context of the good Samaritan aggravator set forth under RCW 9.94A.535(3)(w).

When the proper concept of good Samaritan in Washington is applied here, it is clear Miller was not acting as a good Samaritan when he was murdered. Unlike in Hopper, Siers or Hillman, the murder of Miller

was not contemporaneous with the acts he engaged in that the State claimed made him a good Samaritan. To the contrary, it was ten days prior to his murder, after being arrested on outstanding warrants, that he finally reported to police he had witnessed Eke and Durga assault Cover weeks before. 10RP 621-24. Moreover, this act of reporting stands in stark contrast to what constituted providing "aid" to an imperiled person discussed in the cases cited above. It is difficult to fathom how Miller's act of reporting constituted aid to Cover, or any other specific person. Although it may have been the civically responsible thing to do, it was not aimed at saving anyone in particular from an imperiled state. Miller may have been a good citizen when he was murdered, but he was not acting as a good Samaritan as the concept is used in Washington. This Court should therefore dismiss the erroneous good Samaritan finding by the jury and remand for resentencing.

The State is likely to argue that remand for resentencing is not necessary because the trial court stated it would impose the same sentence even if one of the aggravators were absent. For at least a couple of reasons, this Court should reject such an argument. First, the trial court's statement is ambiguous because it is not clear whether the court meant it would still impose the 360 months for the murder of Miller even if deliberate cruelty aggravator for the Peterson murder went away, or if it

meant it would still impose 660 months total. Although it states it is "finding that the total sentence that has been imposed" would be justified based on a single aggravator, the court goes on to note that it has purposefully imposed unequal sentences (plural) on the murders and that absent one of the aggravators, "I cannot see that a different sentence [(singular)] would be justified under these circumstances." 11RP 1484. It is unclear from the statements whether on remand for resentencing without the good Samaritan aggravator the court would impose a total of 660 months for the murders, or instead impose a total of 565 month sentence; 300 months for the Peterson murder and 265 months for the Miller murder.

Second, the trial court undeniably determined that the good Samaritan aggravator warranted harsher punishment than the other. 11RP 1478-83. Without the good Samaritan aggravator, however, the maximum sentence for the murder of Miller is 265 months. 11RP 1482. As such, in order to achieve the same sentence on remand, the court would have to impose an exceptional sentence of 395 month for the murder of Peterson, 175 months above the standard range. Id. Under the circumstances, it is questionable at best whether the trial court would impose the same 55-year sentence absent the aggravator it held warranted the harshest punishment.

2. THE TRIAL COURT'S CONSIDERATION OF
POTENTIAL "GOOD TIME" CREDITS WHEN
IMPOSING SENTENCE WAS IMPROPER

Both this court and the Supreme Court have repeatedly cautioned lower courts not to rely on the possibility of good time credits when imposing sentence. This is true under both the Sentencing Reform Act (SRA) and Juvenile Justice Act (JJA). See, e.g., State v. Sledge, 133 Wn.2d 828, 845, 947 P. 2d 1199 (1997); State v. Fisher, 108 Wn.2d 419, 429 n.6, 739 P.2d 683 (1987); State v. Buckner, 74 Wn. App. 889, 899, 876 P.2d 910 (1994), reversed on other grounds, 125 Wn.2d 915, 919 (1995); State v. Bourgeois, 72 Wn. App. 650, 659-661, 866 P.2d 43 (1994). The reasoning behind these cases is simple, it is "inappropriate" to determine the length of a sentence by relying on an "entirely speculative prediction of the likely behavior of an offender while in confinement." Fisher, 108 Wn.2d at 430 n.6. Stated another way, "There is no guaranty credits will ever be earned, either because the prisoner fails to qualify or because the Legislature alters the rules." Buckner, 74 Wn. App. at 899.

According to the SRA, good time credits play no role until the offender begins serving his sentence. Specifically, RCW 9.94A.728 provides no person committed to the custody of the DOC may leave confinement before his sentence expires, except in a few specifically

delineated circumstances, one of which is "An offender may earn early release time as authorized by RCW 9.94A.729". That statute provides:

The term of the sentence of an offender committed to a correctional facility operated by the department may be reduced by earned release time in accordance with procedures that shall be developed and adopted by the correctional agency having jurisdiction in which the offender is confined. The earned release time shall be for good behavior and good performance, as determined by the correctional agency having jurisdiction. The correctional agency shall not credit the offender with earned release credits in advance of the offender actually earning the credits.

RCW 9.94A.729(1)(a).

Regardless of the type of sentence imposed, earning early release credits are not guaranteed. The offender may ultimately not qualify for any credits at all, or the Legislature may choose to modify or extinguish the program altogether. Moreover, the SRA specifically delegates to the Department of Corrections (DOC) the power to award early release credits, and may do so only after the offender has been sentenced and actually earned the credits. RCW 9.94A.729(1)(a). See In re Personal Restraint of Atwood, 136 Wn. App. 23, 26, 146 P.3d 1232 (2006) ("Correctional authorities, both county and state, have original authority over good time awards."); In re Personal Restraint of West, 154 Wn.2d 204, 212, 110 P.3d 1122 (2005) (statutory language grants exclusive authority to determine prisoner's earned early release time to the

correctional agency having jurisdiction over the offender; trial court's handwritten notation restricting good time rendered judgment and sentence facially invalid). If the DOC cannot assume credits will ultimately be earned, courts should not either.

Here, the sentencing court imposed a 660-month term of incarceration, exactly 10% more than recommended by the prosecutor, which is exactly how much "good time" credits the prosecutor told the court Crow would be eligible to earn. It cannot reasonably be disputed that the trial court considered the amount of earned early release time Crow was eligible to earn in deciding how long of a sentence to impose. This is the only reasonable inference that can be drawn from the court's inquiry about "good time" credits; why would the court ask about "good time" credits if it was not using it to determine the length of Crow's sentence? This is prohibited under RCW 9.94A.729(1)(a), Fisher, and the other cases rejecting consideration at sentencing of potential earned early release credits.

The trial court unlawfully invaded the DOC's exclusive province by considering possible good time credits when determining an appropriate sentence. Therefore, this Court should reverse and remand for resentencing.

3. IF THIS COURT CONCLUDES CROW WAIVED THE ABOVE ARGUMENTS BECAUSE THEY WERE NOT RAISED ON DIRECT APPEAL, THEN CROW WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AND EITHER REINSTATEMENT OF HIS DIRECT APPEAL OR REVERSAL REQUIRED.

Where there is a right to appeal, an appellant has the right to effective assistance of counsel to pursue that appeal. U.S. Const. amend. 6, 14; State v. Chetty, 167 Wn. App. 432, 440-41, 272 P.3d 918 (2012) (citing, inter alia, Evitts v. Lucey, 469 U.S. at 397). An appellant is denied the right to effective of assistance of appellate counsel where counsel's deficient performance results in prejudice. Chetty, at 440 (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Crow's first appeal involved challenges to justify reversal of Crow's convictions, but raised no challenges regarding his sentence. Because the sentencing issues raised above could have been raised in the direct appeal and would have resulted in resentencing, Crow's direct appeal counsel's failure to do so constitutes deficient performance that prejudiced Crow.

Generally, the remedy for ineffective assistance of appellate counsel is reinstatement of the direct appeal. In re Personal Restraint of Frampton, 45 Wn. App. 554, 563, 726 P.2d 486 (1986). If this Court

determines the issues can be decided adequately based on the existing record and briefing, however, it may decide them in the context of the personal restraint petition, albeit using the direct appeal standard of review, thereby effectively foregoing the need for a separate appellate proceeding. In re Personal Restraint Petition of Dalluge, 152 Wn.2d 772, 778-79, 100 P.3d 279 (2004). Crow is satisfied with either remedy.

D. CONCLUSION

For the reasons stated in Crow's pro se personal restraint petition, this Court should reverse his convictions. Alternatively, for the reasons stated herein, this Court should remand for resentencing before a different sentencing judge, or reinstate Crow's direct appeal.

DATED this 31st day of March 2013.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read 'GIBSON', is written over a horizontal line.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Personal Restraint Petition of Tommy Crow)	
)	
STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 42926-8-II
)	
TOMMY CROW,)	
)	
Petitioner.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF MARCH 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TOMMY CROW
DOC NO. 73446
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF MARCH 2013.

X 

NIELSEN, BROMAN & KOCH, PLLC

March 13, 2013 - 3:05 PM

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